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No. 711.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

UNITED STATES OF AMERICA,
Petitioner,

v.

JEROME KALISHMAN, TRUSTEE IN BANKRUPTCY OF SEYMOUR WALLAS AND COMPANY, BANKRUPT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MEMORANDUM FOR JEROME KALISHMAN, TRUSTEE IN BANKRUPTCY OF SEYMOUR WALLAS AND COMPANY, BANKRUPT, RESPONDENT.

HARRY S. GLEICK,
1062 Paul Brown Building,
St. Louis, Missouri 63101.
MAin 1-1250,
Attorney for Trustee.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477

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We agree that there is a conflict between the decision of the Fifth Circuit Court of Appeals in United States v. Nicholas, 346 F. (2d) 32, and with the decision of the Eighth Circuit in this case. Whether the conflict is of sufficient importance to justify certiorari of course is for this Court to decide. We respectfully suggest that if certiorari is granted in one case it should be granted in both.

We have two comments upon the Government's position.

In the petition in this case on page 3 of the petition the assertion is made that the Eighth Circuit Court of Appeals ruled that the principal amount of the tax "was properly allowable as an expense of administration, entitled to first priority in payment under Section 64 (a) of

the Bankruptcy Act." This is a technically correct statement, but is to some extent misleading. Where a Chapter XI proceeding is superseded by an adjudication and a liquidation in straight bankruptcy, all other costs and expenses of administration are likewise entitled to the same priority and are on a parity with the claim of the United States as the Eighth Circuit decision points out (see petition of the United States at page 12). The United States has no priority over other costs of administration.

Our second comment relates to the suggestion of the Government, in the last paragraph on page 3 of its memorandum on the petition for certiorari in the Nicholas case (No. 650). The statement is made that the Court should defer action in this case until the Nicholas case is determined. We take the position that if certiorari is granted in one case, it should be granted in both, and that both should be heard at the same time. The Eighth Circuit had before it the decision in the Nicholas case at the time of its decision in this case; the Department of Justice furnished copies to the Judges of the Eighth Circuit. But the Court believed that the Nicholas case was not sound and declined to follow it. There was no conflict until the decision in Kalishman. Irrespective of the motive behind the suggestion, we venture that the recommendation of petitioner that the Nicholas case be heard first and the Kalishman case be deferred, is neither sound nor valid, and that in the interests of justice both cases should be heard together in the event certiorari be granted in either.

Respectfully submitted,

HARRY S. GLEICK,
1062 Paul Brown Building,
St. Louis, Missouri 63101,
MAin 1-1250,
Attorney for Trustee.

November, 1965.